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**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF NEVADA**

Cung Le, Nathan Quarry, Jon Fitch, Brandon Vera, Luis Javier Vazquez, and Kyle Kingsbury on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

Zuffa, LLC, d/b/a Ultimate Fighting Championship and UFC,

Defendant.

Case No.: 2:15-cv-01045-RFB-(BNW)

**PLAINTIFFS' MOTION FOR LEAVE TO FILE NOTICE OF SUPPLEMENTAL AUTHORITY REGARDING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION (ECF NO. 518)**

**NOTICE OF MOTION AND MOTION**

Pursuant to Local Civil Rule 7-2(g), Plaintiffs Cung Le, Nathan Quarry, Jon Fitch, Luis Javier Vazquez, Brandon Vera, and Kyle Kingsbury ("Plaintiffs"), on behalf of themselves and all others similarly situated, hereby file this Motion for Leave to File Notice of Supplemental Authority Relating to Plaintiffs' Motion for Class Certification (ECF No. 518). This Motion is based on this Notice of Motion, the Memorandum of Points and Authorities incorporated herein; the attached exhibit; the entire record in this action; and other such matters and argument as may be presented to the Court.[1]

**MEMORANDUM OF POINTS AND AUTHORITIES**

Plaintiffs seek leave to file the August 16, 2019 Opinion of the United States Court of Appeals for the Ninth Circuit in *Senne et al. v. Kansas City Royals Baseball Corp.*, Nos. 17-16245, 17-16267, and 17-16276 (9th Cir. August 16, 2019) (hereafter "*Senne*") (attached hereto as Exhibit A), as a supplemental authority in support of their motion for class certification.

The Plaintiffs in *Senne* sought Rule 23(b)(3) certification of three classes of current and former minor league baseball players alleging wage and hour violations: a California class consisting of players who played minor league baseball in California, an Arizona class consisting of minor league players who attended spring training in Arizona, and a Florida class consisting of minor league players who attended spring training in Florida.[2] Defendants included twenty-two of the thirty MLB teams, as claims against eight teams were dismissed for lack of personal jurisdiction. *Senne* at 11 n.3.

The district court granted certification of the California class, but denied certification of the Arizona and Florida classes, finding that choice-of-law concerns defeated predominance. *Id.* at 15. Plaintiffs appealed the district court's decision not to certify the Arizona and Florida classes, and Defendants appealed the certification of the California class. *Id.* The Court of Appeals affirmed the certification of the California class, *id.* at 57, and reversed the decision not to certify the Arizona and

[1] Plaintiffs' proposed Notice of Supplemental Authority complies with the guidelines set forth in *F.D.I.C. v. Johnson*, 2014 WL 5324057, at *2 (D. Nev. Oct. 17, 2014) ("Such notice will include the relevant citation, with the full text of the opinion appended. The body of the notice will be no longer than three pages, explaining briefly how it relates to the pleadings or motions currently before the Court").

[2] Plaintiffs in *Senne* also sought certification of a Rule 23(b)(2) class and an FLSA collective action.

Florida classes, *id*. at 29, holding that all three classes satisfied the requirements of Rule 23(b)(3).

The class members in *Senne* were employed by twenty-two different MLB clubs, and there were relevant differences among the teams with respect to payment of players.[3] Nevertheless, the Court held that common issues predominated, noting, "'Predominance in employment cases is rarely defeated on the grounds of differences among employees so long as liability arises from a common practice or policy of an employer,'" *id*. at 40 (quoting 7 Newberg on Class Actions § 23:33 (5th ed. 2012)); *see also Senne* at 49 ("Damages may well vary, and may require individualized calculations. But 'the rule is clear: the need for individual damages calculations does not, alone, defeat class certification.'") (quoting *Vaquero v. Ashley Furniture Indus., Inc*., 824 F.3d 1150, 1155 (9th Cir. 2016)).

The Ninth Circuit's decision in *Senne* demonstrates the correctness of Plaintiffs' statement of the standard for reviewing expert evidence on a motion for class certification. As Plaintiffs noted in their opening brief in support of class certification in this case, the most plaintiffs need to show is that they have proffered "evidence common to the class that (1) if believed, could support their claims, and (2) is admissible. *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1049 (2016) ('The District Court could have denied class certification on th[e] ground [that it agreed with Defendants' experts] only if it concluded that *no reasonable juror* could have believed that' plaintiffs' experts were right on the merits (emphasis added))." Plaintiffs' Motion for Class Certification (ECF No. 518) at 13; *see also* Reply in Support of Plaintiffs' Motion for Class Certification (ECF No. 554) at 3 ("Indeed, *Tyson Foods* held that if evidence is reliable and *capable of proving* an element on a classwide basis, nothing more is needed for class certification."). As Plaintiffs observed further in their Statement Regarding Rule 23 Standards (ECF No. 633) at 2-3, the Ninth Circuit has held that evidence need not even be admissible for it to satisfy Rule 23; it need merely be plausible. *See Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1004-06 (9th Cir. 2018) (emphasis added) ("Although we have not squarely addressed the nature of the 'evidentiary proof' a plaintiff must submit in support of class certification, *we now hold that such proof need not be admissible evidence.*"); *see also* Plaintiffs' Response to Defendant Zuffa, LLC's Objections

[3] *See, e.g., Senne* at 10 ("Although most players do not get paid during extended spring training, as many as seven MLB clubs do pay for work during extended spring training due to an ambiguity in the MLRs over whether players are permitted to be paid.").

to Plaintiffs' Exhibit List Documents (ECF No. 674), at 1 (quoting *Sali*, 909 F.3d at 1004); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 308 F.R.D. 606, 629 (N.D. Cal. 2015) (emphasis in original) ("the Court is still *not* tasked with resolving conflicts between opposing experts when evaluating predominance" -- class certified where "methodology for determining antitrust damages on a classwide basis is plausible"); *Hartman v. Uponor, Inc.*, 2013 WL 12315163, at *8 (D. Nev. Nov. 25, 2013) ("the Court may consider hearsay testimony in regard to class certification").

Zuffa argues that, beyond simply deciding whether Plaintiffs' expert evidence is plausible (or at most admissible), the Court should weigh the parties' expert opinions and decide which experts are *more* plausible. *See* Zuffa, LLC's Opposition to Plaintiffs' Motion for Class Certification (ECF No. 540), at 12-13. This formulation cannot be squared with *Tyson Foods*, nor with the Ninth Circuit's recent decisions in *Sali* and *Senne*, nor with the district court's refusal to do so in *CRTs*.[4] The Ninth Circuit just held in *Senne* that "where the evidence is admissible—for expert evidence, using the *Daubert* standard—then the 'no reasonable juror' standard at the class certification stage applies." *Senne*, at 45 (citing *Tyson Foods*, 136 S. Ct. at 1049). Thus, if Plaintiffs' expert evidence in support of class certification here is admissible and a reasonable juror could credit it, Plaintiffs' motion for class certification should be granted.

In light of the foregoing, the Ninth Circuit's August 16, 2019 decision in *Senne* provides additional support for Plaintiffs' motion for class certification.

[4] Even under Zuffa's incorrect proposed standard, the Court should credit the opinions of Plaintiffs' experts over those of Zuffa's experts, for the reasons set forth in Plaintiffs' briefs in support of class certification.

Dated: August 22, 2019

Respectfully Submitted,

By: /s/ Eric L. Cramer
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 22nd day of August 2019 a true and correct copy of PLAINTIFFS' MOTION FOR LEAVE TO FILE NOTICE OF SUPPLEMENTAL AUTHORITY REGARDING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION (ECF NO. 518) was served via the District of Nevada's ECF system to all counsel of record who have enrolled in the ECF system.

By: */s/ Eric L. Cramer*